

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

ENFORCEMENT NOTICE

To: Valca Vehicle and Life Cover Agency Limited

Of: 281 Palatine Road, Manchester, England M22 4ET

1. The Information Commissioner ("Commissioner") has decided to issue Valca Vehicle and Life Cover Agency Limited ("Valca") with an enforcement notice under section 40 of the Data Protection Act 1998 ("DPA"). The notice is in relation to a serious contravention of Regulations 22 and 23 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR").
2. This notice explains the Commissioner's decision.

Legal framework

3. Valca, whose registered office is given above (Companies House Registration Number: 11013461) is the organisation stated in this notice to have transmitted unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.
4. Regulation 22 of PECR states:

- “(1) This regulation applies to the transmission of unsolicited communications by means of electronic mail to individual subscribers.
- (2) Except in the circumstances referred to in paragraph (3), a person shall neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified the sender that he consents for the time being to such communications being sent by, or at the instigation of, the sender.
- (3) A person may send or instigate the sending of electronic mail for the purposes of direct marketing where—
- (a) that person has obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or service to that recipient;
 - (b) the direct marketing is in respect of that person’s similar products and services only; and
 - (c) the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did not initially refuse the use of the details, at the time of each subsequent communication.
- (4) A subscriber shall not permit his line to be used in contravention of paragraph (2).”

5. Regulation 23 of PECR states that "A person shall neither transmit, nor instigate the transmission of, a communication for the purposes of direct marketing by means of electronic mail –

- (a) where the identity of the person on whose behalf the communication has been sent has been disguised or concealed;
- (b) where a valid address to which the recipient of the communication may send a request that such communications cease has not been provided
- (c) where that electronic mail would contravene regulation 7 of the Electronic Commerce (EC Directive) Regulations 2002; or
- (d) where that electronic mail encourages recipients to visit websites which contravene that regulation."

6. Section 122(5) of the DPA 2018 defines direct marketing as "the communication (by whatever means) of advertising material which is directed to particular individuals". This definition also applies for the purposes of PECR (see regulation 2(2) PECR; and Schedule 19, paragraph 430 and 432(6) DPA18).

7. Consent is defined in Article 4(11) the General Data Protection Regulation 2016/679 as "any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.

8. "Individual" is defined in regulation 2(1) of PECR as "a living individual and includes an unincorporated body of such individuals".

9. A "subscriber" is defined in regulation 2(1) of PECR as "a person who is a party to a contract with a provider of public electronic communications services for the supply of such services".
10. "Electronic mail" is defined in regulation 2(1) of PECR as "any text, voice, sound or image message sent over a public electronic communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient and includes messages sent using a short message service".
11. The DPA contains enforcement provisions at Part V which are exercisable by the Commissioner. Those provisions are modified and extended for the purposes of PECR by Schedule 1 PECR.
12. Section 40(1)(a) of the DPA (as extended and modified by PECR) provides that if the Commissioner is satisfied that a person has contravened or is contravening any of the requirements of the Regulations, she may serve him with an Enforcement Notice requiring him to take within such time as may be specified in the Notice, or to refrain from taking after such time as may be so specified, such steps as are so specified.
13. PECR implements European legislation (Directive 2002/58/EC) aimed at the protection of the individual's fundamental right to privacy in the electronic communications sector. PECR was amended for the purpose of giving effect to Directive 2009/136/EC which amended and strengthened the 2002 provisions. The Commissioner approaches PECR so as to give effect to the Directives.

14. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the Data Protection Act 2018 (see paragraph 58(1) of Part 9, Schedule 20 of that Act).

The contravention

15. The Commissioner finds that Valca contravened regulations 22 and 23 of PECR.
16. The Commissioner finds that the contravention was as follows:
17. The Commissioner finds that between 15 June 2020 and 20 July 2020 there were 95,004 unsolicited direct marketing text messages received by subscribers. This resulted in a total of 114 complaints being received via the 7726 service. The Commissioner finds that Valca transmitted the direct marketing messages received, contrary to regulation 22 of PECR.
18. The Commissioner is satisfied that the contravention could have been higher, with a total of 104,550 unsolicited text messages being sent over the relevant time using the [REDACTED] platform, and a further 2,025 being sent using [REDACTED].
19. Of the messages known to have been received, 18,393 (i.e., all of those received before 25 June 2020) did not contain an opt-out link, contrary to the requirements of regulation 23 PECR.
20. Valca, as the sender of the direct marketing, is required to ensure that it is acting in compliance with the requirements of regulation 22 of PECR, and to ensure that valid consent to send those messages had been acquired.

21. Valca relied on consent obtained by another organisation for its own purposes, i.e., 'indirect consent'. The Commissioner's direct marketing guidance says "organisations need to be aware that indirect consent will not be enough for texts, emails or automated calls. This is because the rules on electronic marketing are stricter, to reflect the more intrusive nature of electronic messages."
22. It goes on to say that indirect consent can be valid but only if it is clear and specific enough. Moreover, "the customer must have anticipated that their details would be passed to the organisation in question, and that they were consenting to messages from that organisation. This will depend on what exactly they were told when consent was obtained".
23. Consent will not be "informed" if individuals do not understand what they are consenting to. Organisations should therefore always ensure that the language used is clear, easy to understand, and not hidden away in a privacy policy or small print. The Commissioner is concerned that at the point of consent being obtained, subscribers are asked to tick a box which gives a misleading impression that only a limited number of 16 organisations may contact them (duly named within the 'partners' link on the registration page). However, it is only if subscribers drill down into the separate privacy policy that they are advised that any one of 450 companies may in fact contact them, none of which the subscriber has any ability to refuse contact from.
24. It is the Commissioner's position that consent will not be valid if individuals are asked to agree to receive marketing from "similar organisations", "partners", "selected third parties" or other similar generic description. Further, and relevantly, consent will not be valid where an individual is presented with a long, seemingly exhaustive list of general categories of organisations. The Commissioner finds that

450 organisations, concerning 40 sectors, is far too exhaustive a list to enable individuals to give valid consent.

25. During the course of the investigation, Valca provided an invoice dated 16 March 2020 between it and its third-party data provider to demonstrate that it had paid to be added to the privacy policy for [REDACTED], the website from which its third-party data provider obtained data. The date on which Valca were added to the privacy policy is unclear, however the Commissioner has evidence that it was not listed as a 'direct client', or apparently at all on [REDACTED], by 22 June 2020, by which point Valca had already sent 16,759 unsolicited text messages using data obtained from that site. In any event, even after Valca had been added to the privacy policy, the Commissioner has concerns that any consents relied on by Valca cannot be said to be valid.
26. There is nothing immediately in the consent statement at registration that would inform an individual that by agreeing to the privacy policy and terms and conditions, they are in fact agreeing for their data to be passed to 450 companies spanning 40 various sectors. Whilst there is a third-party consent opt-in box, this only lists 16 companies at the point of consent and gives individuals no indication that for a more comprehensive list they will need to consult the privacy policy. This cannot constitute informed consent.
27. The Commissioner is therefore satisfied from the evidence she has seen that Valca did not have the necessary valid consent to send the 95,004 unsolicited direct marketing messages received by subscribers. This constitutes a contravention of regulation 22 PECR.
28. The Commissioner is also concerned that 18,393 of those received messages (i.e., all of those received before the Commissioner's initial

investigation letter) did not contain an opt-out link. As such, the Commissioner is satisfied that the actions of Valca in respect of these 18,393 messages have also contravened regulation 23 PECR.

29. The Commissioner has considered, as she is required to do under section 40(2) of the DPA (as extended and modified by PECR) when deciding whether to serve an Enforcement Notice, whether any contravention has caused or is likely to cause any person damage or distress. The Commissioner has decided that, given the ongoing pandemic, and the nature of the unlawful direct marketing taking place, it is likely that damage or distress has been caused in this instance.
30. **In view of the matters referred to above the Commissioner hereby gives notice that, in exercise of her powers under section 40 of the DPA, she requires Valca to take the steps specified in Annex 1 of this Notice.**

Right of Appeal

31. There is a right of appeal against this Notice to the First-tier Tribunal (Information Rights), part of the General Regulatory Chamber. Information about appeals is set out in the attached Annex 2.

Dated the 18th day of February 2021

Andy Curry
Head of Investigations
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

ANNEX 1

TERMS OF THE ENFORCEMENT NOTICE

Valca shall within 30 days of the date of this notice:

- Except in the circumstances referred to in paragraph (3) of regulation 22 of PECR, neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified Valca that he clearly and specially consents for the time being to such communications being sent by, or at the instigation of, Valca.
- Furthermore, Valca shall neither transmit, nor instigate the transmission of, a communication for the purposes of direct marketing by means of electronic mail:
 - (a) where the identity of the person on whose behalf the communication has been sent has been disguised or concealed;
 - (b) where a valid address to which the recipient of the communication may send a request that such communications cease has not been provided
 - (c) where that electronic mail would contravene regulation 7 of the Electronic Commerce (EC Directive) Regulations 2002; or
 - (d) where that electronic mail encourages recipients to visit websites which contravene that regulation."

ANNEX 2

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 48 of the Data Protection Act 1998 gives any person upon whom an enforcement notice has been served a right of appeal to the First-tier Tribunal (Information Rights) (the "Tribunal") against the notice.
2. If you decide to appeal and if the Tribunal considers:-
 - a) that the notice against which the appeal is brought is not in accordance with the law; or
 - b) to the extent that the notice involved an exercise of discretion by the Commissioner, that she ought to have exercised her discretion differently,

the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.

3. You may bring an appeal by serving a notice of appeal on the Tribunal at the following address:

General Regulatory Chamber
HM Courts & Tribunals Service
PO Box 9300
Leicester
LE1 8DJ

Telephone: 0300 123 4504

Email: grc@justice.gov.uk

- The notice of appeal should be served on the Tribunal within 28 days of the date on which the enforcement notice was sent

4. The statutory provisions concerning appeals to the First-tier Tribunal (General Regulatory Chamber) are contained in sections 48 and 49 of, and Schedule 6 to, the Data Protection Act 1998, and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)).